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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. [redacted]. 124

BARBARA J. FUHRMAN,
Administratrix of the Estate of Arthur J. Fuhrman, Deceased, *et al.*,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LUCIAN Y. RAY,
ROMAN T. KEENEN,
McCREARY, RAY & ROBINSON,
1550 Union Commerce Building,
Cleveland, Ohio 44115,
Attorneys for Respondent.

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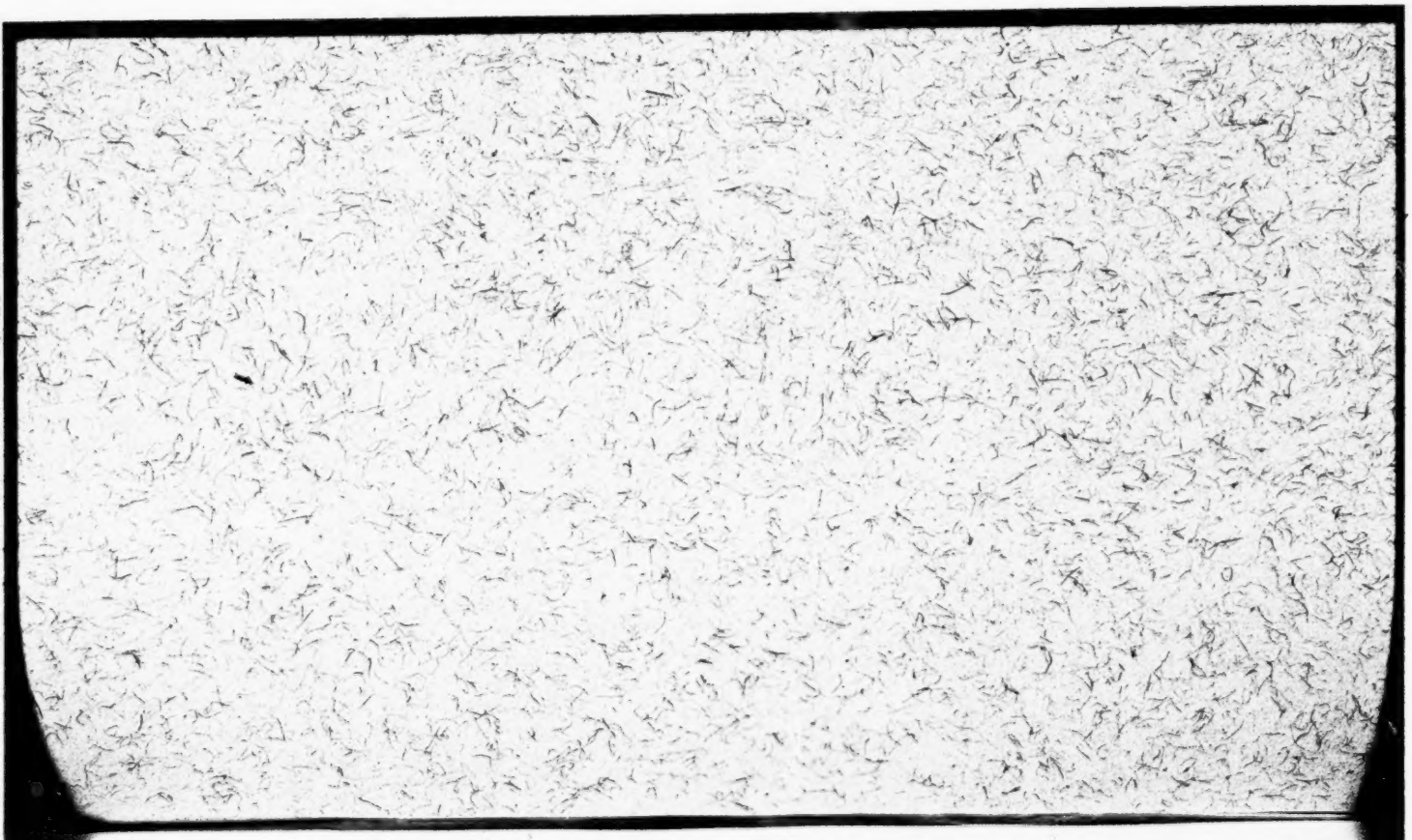

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1403.

BARBARA J. FUHRMAN,
Administratrix of the Estate of Arthur J. Fuhrman, Deceased, *et al.*,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

1. Whether punitive damages are recoverable against a vessel owner for the acts of a master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident.

2. Whether, under the facts herein, there was a duty on the part of the vessel owner to speak or otherwise interfere with the authority of the master of the Cedarville.

COUNTER STATEMENT OF THE CASE.

The Cedarville, built in 1927, was a self-unloader, 604 feet long, with a beam of 60 feet. On May 7, 1965, she departed Calcite, Michigan, enroute to Gary, Indiana, with 14,411 tons of open hearth limestone and a crew, including Captain Joppich, of 35 persons. Her drafts upon departure were 22'01" forward and 22'05" aft. (329a, 503a)

The Cedarville proceeded to the Straits of Mackinac under the supervision and navigation of the Master. Captain Joppich, in conjunction with other officers on watch, used the radar and radio direction finder to establish their positions at various times. All navigation, communication and operating equipment was in satisfactory working condition prior to the casualty.

After clearing Calcite, the Cedarville proceeded in light fog at full speed. (272a) Fog signals were being sounded by means of the automatic fog signal device. (274a) When abeam of Forty Mile Point and two statute miles off, with visibility of approximately one mile, a new course of 305° gyro was set. (234a) This course, which generally follows the recommended track line on Great Lakes Survey Chart No. 60, was continued to 0748 hours when the course was altered to 261° gyro, using Poe Reef Light radio beacon and a radar range as a position fix. (235a, 236a) At 0812, with the Poe Reef Light abeam, and visible one-half mile to starboard, the course was changed to 285° gyro. (236a) At 0842 the Cheboygan Traffic Lighted Bell Buoy was abeam and close aboard to port, with visibility of about three-fourths of a mile. (237a) The average speed of the vessel from Forty Mile Point to the Cheboygan Traffic Buoy was 11.7 statute miles per hour.

At the Cheboygan Traffic Buoy a course of 302° gyro was set for the Mackinac Bridge Lighted Bell Buoy No. 1. (237a) Upon this change of course, as on previous changes, the Master of the Cedarville transmitted a security call giving the new course and position of his vessel. Approximately five minutes later radiotelephone communications were established with the downbound Benson Ford. A passing agreement was verbally arrived at and one-blast passing signals for a port-to-port passing were exchanged when the vessels were approximately

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two miles apart. The Cedarville's course was altered to 305° to give the other vessel more room, her engines were checked to one-half speed, and the vessels passed each other without incident, at a distance of approximately one-half mile. (237a, 239a)

The Cedarville continued her course of 305° and when she was three or four miles from the Mackinac Bridge established radiotelephone communications with the Weissenburg, which was approaching east in the Mackinac Bridge channel. The Weissenburg indicated an intention to go down the South Channel and a port-to-port passing agreement was reached between the two vessels. (240a) No passing signals were exchanged but the Cedarville's course was altered to 310° to facilitate the passing. Her speed was about six miles per hour and visibility was estimated at 1200 feet. (241a) The Cedarville continued to sound fog signals. Fog signals from the general direction of the Mackinac Bridge were reported by the lookout and were heard by Captain Joppich.

The Weissenburg passed under the Mackinac Bridge at 0938 and at that time the Master of that vessel told Captain Joppich, by radiotelephone, that there was a Norwegian vessel, later identified as the Topdalsfjord, ahead of him. (385a) Captain Joppich attempted, without success, to communicate with the Topdalsfjord and secure a passing agreement. (263a) He continued to get radar reports of the positions of the Topdalsfjord. (242a, 509a) The Cedarville proceeded at slow speed on a course of 310° with the Third Mate keeping the Master informed as to the ranges and bearings, on radar, of the other vessel. 242a, 243a) Within the two-mile range no precise ranges or bearings were reported but the Topdalsfjord appeared to be "widening out to port." (292a, 294a) Several one-blast passing signals were sounded by the Cedarville,

without response from the other vessel. (295a-297a) As the distance decreased, the course of the Cedarville was gradually altered to her right. (294a) Shortly thereafter the Topdalsfjord loomed out of the fog at a distance of approximately 900 feet. The engines of the Cedarville were immediately put at full ahead on a hard right wheel. (510a, 511a) When the bow of the Cedarville passed ahead of the bow of the Topdalsfjord, the former's helm was put hard left in an effort to swing her stern clear. (511a-513a) The Topdalsfjord was on a steady heading and at a right angle to the Cedarville's general approach. She collided with the Cedarville at a point on that vessel abreast of No. 7 hatch, with the angle of collision being approximately 90° to the keel line of the Cedarville. (511a) The collision occurred at 0945 and its location was 078° and approximately 6,600 feet from the south tower of the Mackinac Bridge. (473a)

As a result of being holed, both above and below the waterline, the water immediately entered into the Cedarville's No. 2 hold and she took a list to port. (316a)

Immediately following the collision, Captain Joppich stopped the Cedarville's engines, sounded a general alarm, broadcast a May Day message and dropped the port anchor. (315a, 513a) The First Mate went aft to examine the damage and after so doing, reported that the vessel was taking a tremendous amount of water into No. 2 hold and that an attempt to cover the hole with a collision mat was unsuccessful. (335a, 378a, 514a) The collision was promptly reported to the Mackinac Island Coast Guard Station. (228a, 312a, 362) It was also reported to the office at Rogers City.

At no time was the order to abandon ship given. The Weissenburg was approximately a mile from the collision area. (387a) As soon as the nature and extent of

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the damages was known, Captain Joppich ordered the anchor raised and steps were taken to attempt to beach the vessel at Mackinaw City. (515a) After declining the Weissenburg's offer to take the crew off and requesting that vessel to stand clear, Captain Joppich transmitted several May Day messages and proceeded on a course of 140° toward the beach. (245a, 371a, 391a, 517a) At approximately 1025, or about forty minutes after the collision, the Cedarville, with little freeboard remaining, suddenly rolled over to starboard and sank. (339a, 518a) She went down at a point 120° and approximately 17,000 feet from the south tower of the Mackinac Bridge. The distance travelled from the point of collision to where she sank was approximately 2.3 miles and the remaining distance to the beach was about 2 miles.

Ten members of the crew of the Cedarville died as a result of the disaster and other crew members sustained personal injuries.

At the time of the collision, Captain Parrilla, manager of Bradley Fleet (owned and operated by United States Steel) was in Pittsburgh, Pennsylvania, conferring with Admiral Khoury, an official of that Company. (62a, 76a) Captain Joppich contacted the Bradley office at Rogers City and reported the collision to Russell Smart, a dispatcher, who in turn called Clifford Buehrens, Assistant Manager, Maintenance and Repairs. (177a) Mr. Buehrens then went from his office on the Calcite dock to Smart's office and requested Station WLC to attempt to contact the Cedarville. This was at 1005. (177a) Shortly thereafter he called Captain Parrilla and told him that the Cedarville had been in collision and that he was attempting to reach that vessel and find out what had happened. (178a) Buehrens then went to Station WLC, which is owned by United States Steel, and during the period from 1025 to

1030 he listened to the monitoring of the conversations over the air and the radio operator's attempts to reach the Cedarville. (179a) At 1039 Buehrens heard a conversation that there were men in the water and at about 1048 he heard the Coast Guard Cutter Mackinaw, whose assistance he had previously requested, advise that she was proceeding out of Cheboygan Harbor. (181a) At about 1050 Buehrens talked with Captain Parrilla on the telephone for the second and final time. He advised that he believed that the Cedarville had sunk or was sinking. (182a) At about that time, Captain Parrilla was in radiotelephone communication with the Munson, another vessel of the Bradley fleet, and directed her to proceed to the scene and render assistance. (183a) There were no communications between Captain Joppich and Captain Parrilla either before or after the collision and no instructions concerning the handling of the Cedarville were given to Captain Joppich by Captain Parrilla, either directly or through a third person.

On May 15, 1965, United States Steel filed a petition for exoneration from or limitation of liability in the United States District Court at Cleveland. (5a-13a) Similar petitions were filed in the United States District Court at Chicago by the owner of the Topdalsfjord and by the owner of the Weissenburg. The petitions were transferred to Cleveland and all subsequent proceedings, from a trial standpoint, were had in that Court.

Based upon a stipulation signed by counsel for the three vessel owners, an order was entered denying the petition of United States Steel Corporation and Den Norske Amerikalinje (owner of the Topdalsfjord) for exoneration from and limitation of liability; entering judgment for the claimants against United States Steel and Den Norske and waiving claimants' right to proceed against the

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owner of the Weissenburg; punitive damages claims to be against United States Steel alone; claims for compensatory damages to be submitted to a Commissioner, with claims for punitive damages to be determined by the Court, with a right to review and/or appeal. (57a-59a)

Also based upon a stipulation of the parties, the hearing on punitive damages was confined to testimony and exhibits adduced at the deposition of witnesses and excerpts from the Coast Guard record with each side permitted to call expert witnesses after due notice. (57a-59a)

On October 27, 1967, the Trial Court filed an opinion finding United States Steel liable for punitive damages and on November 16, an order awarding punitive damages in favor of the claimants and against United States Steel was entered. (522a-590a)

An appeal to the United States Court of Appeals for the Sixth Circuit was taken and on March 7, 1969, that Court reversed the decision of the Court below. (Appendix B, pp. 76a-88a)

As one of the principal grounds for awarding punitive damages, the District Court found that the failure of the officials of United States Steel to intervene and countermand the order of Captain Joppich to beach the Cedarville was in callous disregard of their duty to the crewmen. It also found that it was common practice for those officials to order the vessels to proceed at full speed ahead in fog and to deviate from recommended courses published by the United States Coast Guard for ship traffic in the Straits of Mackinac. (Appendix B, p. 78a)

The Court of Appeals ruled that the "clearly erroneous rule" applied to the findings of the District Court notwithstanding that he had heard no live testimony at the trial. (Appendix B, p. 80a) It then stated as follows (Appendix B, p. 81a):

"After a careful review of the record, we hold that the findings of the District Judge to which we have referred above and upon the basis of which the District Court awarded punitive damages against United States Steel are clearly erroneous."

ARGUMENT.

1. This Is a Collision Case. The Principal Issues Are Factual Which Have Received Consideration by the Two Lower Courts. Another Review of Those Facts by This Court Is Not Justified.

The collision itself acts as a natural dividing line between the events which occurred before and those which occurred thereafter. In connection with the pre-collision navigation of the Cedarville, the Court of Appeals ruled that the record fails to disclose evidence that it was standard procedure for United States Steel to order its vessels to ignore the recommended courses of navigation and that it ordered its vessels to proceed full speed ahead in a heavy fog. (Appendix B, p. 81a)

This Court, on numerous occasions, has stated that certiorari is not granted to review evidence and discuss specific facts or to give the party defeated in the Court below another hearing. This doctrine, relating to certiorari procedure, is too well established to require supporting citations. If, however, such an examination is made, it will reveal that there is no evidence that the masters of the Bradley vessels were ordered to proceed at full speed in a fog. Had such testimony been forthcoming, it would undoubtedly have been developed through Captain Parrilla, the Manager of that fleet. He not only did not so testify but there is testimony to the contrary and the trip sheets of the Cedarville (Freedman Exhibit 6) do not reveal otherwise.

There are no "recommended courses" published by the United States Coast Guard. The official Government publication, *Great Lakes Pilot*, 1965, in describing navigation from Calcite to the Straits of Mackinac, South Channel, gives no recommended courses.

What has been loosely described as "recommended courses" are the ones described on the navigation charts as follows:

> "sailing courses and limits indicated in red are recommended by the Lake Carriers Association and the Dominion Marine Association."

No such recommended separate courses between Calcite and the Straits of Mackinac are shown on the chart.

Even if the record established that the Cedarville had departed from "recommended courses" and in so doing had followed the orders of her owner, it would be pure speculation to assume that the departure made the collision inevitable. In considering this phase of the case, the Court below concluded (Appendix B, p. 81a):

> "* * * We hold that even if the collision would not have occurred except for deviation from Coast Guard recommended compass headings, there is still insufficient support in the record for an award of punitive damages against United States Steel."

The petitioners urge that the Court below disregarded the testimony of Captain Joppich that he did not follow the Coast Guard courses because of a customary U. S. Steel practice and, in so doing, was in conflict with the decision of this Court in *The Potomac*, 8 Wall. 590 (Pet. pp. 16-18). The Court below did not disregard the testimony of Captain Joppich. It declined to accept that testimony as proof of knowledge of the deviations by officials of United States Steel or authorization of them by those officials. It said in that connection (Appendix B, p. 81a):

"The only significant evidence in support of these findings are the self-serving statements of Captain Joppich of the Cedarville. There is nothing to indicate that these were authorized procedures dictated by the officials of United States Steel. The isolated action of Captain Joppich does not support a finding that United States Steel knew of this deviation, much less ordered it."

This ruling is not in conflict with *The Potomac, supra.* This Court ruled therein that the declarations of a master, in a case of collision, "may be brought against the owner on the ground that when the transaction occurred, the master represented the owner, and was his agent in navigating the vessel." The declarations of the Master in *The Potomac* were an admission of liability for the collision. That issue was not before either of the lower courts and does not exist here. The admissions of Captain Joppich concerning *his* navigation and handling of the Cedarville are binding upon the owner for the purpose of establishing liability for the collision but his testimony cannot be properly used to establish custom and practice and authorization as far as the rest of the Bradley fleet was concerned. *The Potomac,* if we read it correctly, does not go that far.

The restrictions concerning the admissibility of declarations of the master are set forth in *The Enterprise,* 8 Fed. Cas. 729, cited by this Court in *The Potomac,* at page 594. There the Court said (p. 731):

"* * * I am not aware that the question has been discussed in this country, but I am quite sure the practice has been to *admit declarations made by the master, while in command, concerning any matters which came under his authority as master,* though not part of any res gestae strictly speaking. * * *" [Emphasis supplied]

The claimants herein seek the recovery of punitive damages. This Court has described the factors which must

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exist before such an award is justified. In *Lake Shore and Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 107, commonly accepted as the leading case on the subject, this Court said:

> "In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, *may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages.* * * *"

Even if this Court, contrary to its usual custom, should decide to review this extensive record, it should conclude, as did the Court below, that the above-mentioned factors do not exist.

In subsequent portions of this brief, we will demonstrate, we believe, that the claimed conflict among the circuits and with decisions of this Court does not exist. It seems to us that in connection with this Court's consideration of the petition herein, the words of Mr. Justice Frankfurter, in his dissenting opinion in *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 546, 547, are particularly pertinent. He said:

> "It is, I believe, wholly accurate to say that the Court will be enabled to discharge adequately the vital and, I feel, the increasingly vital, responsibility it bears for the general welfare only if it restricts its reviewing power to the adjudication of constitutional issues or other questions of national importance, including therein settlement of conflict among the circuits. Surely it was this conviction, born of experience, that led the Court to ask of Congress that of the great mass of litigation in the state and federal courts

only those cases should be allowed to be brought here that this Court deemed fit for review. Such was the jurisdictional policy accepted by Congress when it yielded to the Court's realization of the conditions necessary for its proper functioning."

2. The Master of the Cedarville Was Solely Responsible for the Navigation and Handling of the Vessel, Both Before and After the Collision. The ruling of the Court Below That the Company Officials Were Under No Obligation to Countermand the Orders of Captain Joppich Is Sound, Is Supported by Impressive Judicial Authority and Is Not in Conflict With Any Decision of This Court.

The Court below concluded that, considered in retrospect, the decision of Captain Joppich to attempt to beach the vessel was "a tragic error in judgment." (Appendix B, p. 82a) In ruling that that decision was his and his alone, the Court said (Appendix B, pp. 82a, 83a):

> "The relationship of the ship master and the authority and control he exercises over his ship in such emergencies is unique. In order to avoid chaos aboard in such situations it is imperative that the vessel remain under the control of a single individual with complete and undisputed authority. The master of the vessel must assume authority in such a crisis and he has the responsibility to make the final decision as to what the proper course of action must be in view of all of the factors concerned. To hold otherwise would result in hesitations and disastrous delays on the part of the master while he obtains advice and authority from his superiors many miles from the scene. On this very point the Supreme Court in *Columbian Insurance Co. v. Ashby and Stribling*, 38 U.S. 329, 343, speaking through Mr. Justice Story, said:

'Indeed, in many, if not most of the acts done on these melancholy occasions, there is little time for deliberation or consultation. What is to be done, must often, in order to be successful, be done promptly and instantly by the master, upon his own judgment and responsibility. The peril usually calls for action, and skill, and intrepid personal decision without discouraging others by timid doubts or hesitating movements.'

See: *United Geophysical Company v. Vela,* 231 F. (2d) 816, 819 (CCA 5.)"

That Captain Parrilla and other officials of United States Steel were justified in not substituting their judgment for that of the master, under the facts of this case, has judicial support. The case of *The Princess Sophia,* 61 F. (2d) 339 (CCA 9), involved the stranding of a vessel on Vanderbilt Reef, Alaska, during a storm. A subsequent foundering resulted in the loss of all of the passengers and crew. Approximately three hundred fifty persons went down with the vessel. When the stranding occurred, the master contacted agents of the owner and there were vessels in the vicinity which were ready and willing to remove the passengers and crew. Shortly after the stranding the storm increased in intensity and the master decided that the passengers would be safe on board and that they should remain there until the storm abated. It did not abate but got worse and the vessel was driven across the reef and destroyed. During the trial of that case the agent of the vessel owner was asked whether he had issued instructions to the master to hold the passengers on the Sophia. His answer, at page 352, was:

"No, sir. He was on the ground."

In approving the principle that the master must be permitted to make his decisions free from interference from other sources, that Court of Appeals said (p. 352):

> "We think that the lower court was correct in its conclusions that Lowle was not such a managing agent of the company as is referred to in the statute. *But if he had been such, it would not change the result, because the knowledge that he acquired of the situation of the Sophia after her stranding, and of the passengers thereon, would not have justified him in dictating to Locke as to what should or should not be done. For by so doing, Lowle would have divested Capt. Locke of the discretion which the law confers upon the master in emergencies of the character in question* * * *" (Emphasis supplied)

Finally, upon the question of whether the decisions of the master are imputable to the owner, that Court stated (p. 349):

> "There is considerable testimony as to the opinions of the captains of the boats standing by concerning the advisability of transferring the passengers from the Sophia. We believe there is nothing to be gained from reviewing this testimony, since it is beyond cavil that the ultimate decision rests with the captain of the ship, and an error of judgment on his part cannot be imputed to the owner."

The ruling of the Court below, that punitive damages are not recoverable against United States Steel for the acts of Captain Joppich unless it can be shown that it authorized or ratified his acts either before or after the accident, is not contrary to the ruling of this Court in *Lake Shore and Michigan Southern Railway Co. v. Prentice, supra.* The Court below properly cites that decision; *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 556-57; and *Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577 (9th Cir.) in support of its ruling. (Appendix B, p. 85a)

The Court below, in addressing itself to the post-collision events, ruled that there was, because of the

unique authority and responsibility of the master, no obligation, under these facts, for the owner to speak or otherwise interfere with that authority and that the failure to speak did not constitute a ratification of his actions. (Appendix B, p. 85a) There is nothing to the contrary in *Lake Shore, supra.* In that case this Court reversed because improper instructions had been given to the jury concerning the responsibility of the railway for the oppressive and wanton acts of its conductor. In that connection, this Court stated (p. 112):

> "The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well considered precedents."

The ruling below is not only not contrary to the principles set forth in *Lake Shore, supra,* but is supported by the decision of this Court in *The Amiable Nancy, supra.* This Court, in awarding compensatory but denying punitive damages, said (pp. 556, 557):

> "* * * But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. *They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree.* Under these circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to

the extent of vindictive damages. * * *" [Emphasis supplied]

This Court, in *Denver & Rio Grande Railway v. Harris*, 122 U.S. 597, 610, did not hesitate to approve the awarding of punitive damages against the corporation but that ruling was based upon the single ground "that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done."

In an attempt to find a non-existent conflict between the decision below and the decision of this Court in *Lake Shore, supra,* the petitioners urge that the respondent became liable for the acts of Captain Joppich because it was made aware of such intended acts. (Pet., pp. 7-10) Even if it be assumed that the full extent of the seriousness of the situation had been brought home to Captain Parrilla or other officials of United States Steel, which we deny as unsupported in the record, there was still no obligation on their part to usurp the master's authority and countermand his orders. Simple negligence is not sufficient to impose liability for punitive damages. That liability can only arise out of either active participation or ratification. Neither of those elements existed here because of the established doctrine that there can be but one master of a vessel and that no one, including the vessel owner, may usurp that authority. In addition to the case of *United Geophysical Company v. Vela, supra,* cited by and quoted from by the Court below (Appendix B, pp. 83a, 84a), we direct this Court's attention to the language of the Court in *The North Star,* 3 F.(2d) 1010, 1011 (D.C. Miss.) where it said:

> "I have great doubt whether the evidence establishes the facts necessary to the damage claimant's argument. See *Deslions v. La Compagnie Generale*

Transatlantique, 210 U.S. 95, 123, 28 S. Ct. 664, 52 L. Ed. 973. But, assuming it does, I am of opinion that the owner was not personally at fault for the disaster. *The navigation of a vessel at sea is under the absolute control of her master. He has to hold a government license for fitness, and his powers and duties are to a large extent regulated by law. He is responsible for the proper navigation of the vessel.* See *The Styria*, 186 U.S. 1, 9, 22 S. Ct. 731, 46 L. Ed. 1027, for a strong statement of the master's position and duties, and Judge Hale's discussion of them in *The Kronprinzessin Cecile*, (D.C.) 228 F. 946, 957. *I doubt whether an owner on the bridge would have any right to give an order against the master's; there cannot be two captains on the same vessel. No decision has come to my attention in which an owner was held personally at fault for a master's error in navigation at sea.* To warrant doing so it must appear that the owner was in reality in command of the vessel or that the negligent acts were ordered or directed by him. * * *" [Emphasis supplied]

If Captain Joppich was guilty of errors, they were errors of judgment and nothing more. Vessel owner liability for compensatory damages may arise out of these circumstances but negligence, alone, does not support punitive damages.

3. The Ruling of This Court in Mahnich v. Southern S. S. Co., 321 U.S. 96, Has No Application to the Issues of This Case. There Is No Conflict Between That Ruling and the Ruling of the Court Below.

Conscious of the validity of the ruling of the Court below that there "was no duty for the owner to speak or otherwise interfere with the authority of the master of the vessel," the petitioners, *for the first time in this litigation*, make the curious argument that the ruling does violence

to the doctrine that a vessel owner has a non-delegable duty to provide a safe place to work. (Pet., pp. 14-15) This is a transparent but futile effort to show a conflict between the ruling below and a decision of this Court.

In the *Mahnich* case, *supra*, liability was imposed for an injury which resulted from a defective appurtenance of the vessel. Because the obligation to provide an appliance which was reasonably fit for the purpose for which it was being used was absolute, the knowledge of the vessel owner concerning the defect was not material. We do not challenge the validity of this doctrine but it has no application to a situation where, as here, the unseaworthiness arose as a result of a collision with another vessel. The causes of actions herein are predicated upon the Jones Act and the liability of the vessel owner is based upon the alleged negligent handling of the vessel, both before and after the collision. The failure to provide a safe place to work is a doctrine which has no place in these proceedings.

Although calling it by another name, what the petitioners are attempting to rely upon is an alleged breach of a warranty of seaworthiness. It would be idle for us to suggest that the seaworthiness of the Cedarville had not been adversely affected as a result of the collision. It would be equally idle for the petitioners to urge that the seamen on board were relying upon the seaworthiness of a vessel which had received a mortal wound and was headed for the beach. A warranty of seaworthiness does not exist under those conditions. In *Bruszewski v. Isthmian S.S. Co.*, 3 Cir., 163 F.(2d) 720, certiorari denied 333 U.S. 828, 68 S. Ct. 451, 92 L. Ed. 1113, the Court, in discussing the warranty of seaworthiness issue, said (p. 722):

> "We agree with the district judge that, although seaworthiness normally is a question of fact, *Mahnich v. Southern S.S. Co.*, 1944, 321 U.S. 96, 98, 64 S. Ct.

455, 88 L. Ed. 561, it may be stated as a conclusion of law that no warranty of seaworthiness existed here. *Logically construed, liability for an unseaworthy vessel should obtain only when the individual affected is entitled to rely, and does rely, upon the seaworthiness of something actually unseaworthy.* To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally accorded those terms. 'The mere fact that a seaman has been ordered to do a dangerous thing does not establish a case of unseaworthiness. *Chelentis v. Luckenbach S.S. Co.*, 1918, 247 U.S. 372, 38 S. Ct. 501, 62 L. Ed. 1171.' *The Josephine & Mary*, 1 Cir., 1941, 120 F. 2d 459 at page 464." [Emphasis supplied]

To state that a vessel which has been seriously damaged in a collision is warranted as seaworthy would require an equal distortion "of the meaning generally accorded that term."

CONCLUSION.

The issues herein are factual in character. There is no conflict between circuits and no conflict between the decision below and the rulings of this Court. No constitutional issues or questions of national importance are present. The decision below is an affirmance of the established doctrine that there can be but one master of a vessel. The petition for a writ of certiorari should be denied.

Respectfully submitted,

LUCIAN Y. RAY,
ROMAN T. KEENEN,
MCCREARY, RAY & ROBINSON,
Attorneys for Respondent.